Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS W–02–507 OF 2001 AND NO W–02–532 OF 2001
ABDUL HAMID MOHAMAD, MOHD SAARI, MOHD NOOR AHMAD JJCA
9 AUGUST 2002

Civil Procedure *— Injunction — Interlocutory injunction — Bona fide serious issue to be tried — Whether plaintiff would suffer irreparable injury that could not be adequately compensated by damages if the injunction was not granted — Whether trial judge had proceeded on wrong grounds in exercise of discretion to grant injunctions — Whether appellate court was entitled to interfere*

Civil Procedure *— Injunction — Interlocutory injunction — Judge must first be satisfied that plaintiff would suffer irreparable injury or that the plaintiff could not be adequately compensated in damages before proceeding to consider whether the balance of convenience was in plaintiff's favor — Whether there was a need to consider balance of convenience and status quo if first step not crossed*

Civil Procedure *— Stay of proceedings — Arbitration — Defendants entered conditional appearance — Whether constituted the taking of a step in the proceedings — Whether defendants were at all times ready and willing to do all things necessary to the proper conduct of the arbitration — Arbitration Act 1952 s 6*

Civil Procedure *— Stay of proceedings — Arbitration — Onus on plaintiff to satisfy court that it was proper to refuse the application for stay — Whether trial judge proceeded on wrong grounds in refusing stay — Whether trial judge could have been satisfied that plaintiff exhibited strong grounds for refusing a stay*

Under a contract made between the first defendant and the plaintiff, the plaintiff was employed to construct a commercial and apartment complex in Kuala Lumpur known as the 'Marinara' building ('the building'). It was a lump sum contract in the value of RM110m. The payment was guaranteed by an irrevocable bank guarantee of RM122.77m issued by Bank Bumiputra Malaysia Bhd in favor of the plaintiff. Payment under the bank guarantee would be made upon the issuance of the certificate of practical completion ('the CPC') by the architect of the building ('the second defendant'). The date for completion stipulated by the contract was 15 September 1997 but the plaintiff failed to meet the target date for completion and the date for completion was extended from time to time, the last of which was March 2000. The first defendant alleged that at the end of the last date for completion there was continuing default on the part of the plaintiff. After the issuance of notices by the second defendant and the consulting engineer specifying the major shortcomings, the plaintiff proceeded to remedy the same. The first and second defendants were not satisfied with the remedial works done by the plaintiff and the second defendant refused to issue the CPC. As such,

A the plaintiff was not able to claim payment under the bank guarantee. On 14 June 2000, the third defendant under the purported authority of the first defendant entered the building site with uniform guards, some of whom were armed with shotguns. The plaintiff then filed a writ action against the defendants based on trespass and conspiracy to injure the plaintiff's legitimate rights and interests under the B contract. The plaintiff further filed an application in encl 8 at the High Court for injunctions to: (a) restrain the third defendant, its employees and agents from entering the project site without the plaintiff's written consent; (b) restrain the first and second defendants from proceeding with their conspiracy to injure the plaintiff's rights and interests in the project and to prevent the plaintiff from C completing the project, including the issuance of any notice of termination in pursuance of the conspiracy. Meanwhile, the defendants filed an application in encl (16) to stay the plaintiff's writ action pending arbitration pursuant to the contract. The High Court allowed the plaintiff's application in encl (8) and dismissed the D defendants' application in encl (16). In respect of encl (8), the learned High Court judge found that the facts presented had disclosed a bona fide serious issue to be tried and that the plaintiff would suffer an irreparable injury that could not be adequately compensated by damages if the injunction was not granted. As for encl (16), the learned judge was satisfied that the plaintiff had given sufficient E reasons as to why the differences between the parties should not be referred to arbitration. He accordingly refused stay on the grounds, inter alia, that arbitration would not solve the parties' problems but would be a prolonged exercise and that the defendants had entered conditional appearance which amounted to taking steps in the proceedings. The learned judge went on to decide that it was best that F the issues of conspiracy, trespass, issuance of the CPC and the termination of contract be heard together by the court. This was the defendants' appeal.

Held, allowing the defendants' appeal:

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(1) There was a bona fide serious issue to be tried in the instant case. However, the learned judge had misapplied the law to the facts of this case when he held that the plaintiff would suffer an irreparable injury that could not be adequately compensated by damages if the injunction was not granted. The damages that the plaintiff H would suffer were monetary in nature and quantifiable. Even if the defendants were not in a financial position to pay the damages, the means to compensate the plaintiff would always be there in the form of the bank guarantee. The bank guarantee was irrevocable and a claim on it can be made upon production of the CPC by the plaintiff to the bank within 14 days following the date of its issue. I Therefore, if the plaintiff were to succeed at the trial, it would be adequately compensated by an award of damages for the loss it would suffer as a result of the defendants continuing to do what

was sought to be restrained between the time of the application and the time of the trial. Hence, the plaintiff's application for the injunctions should have been refused, no matter how strong the plaintiff's claim appeared to be at that stage (see pp 142F–143B); *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 followed.

(2) The learned High Court judge must first be satisfied that the plaintiff would suffer an irreparable injury or that the plaintiff could not be adequately compensated in damages before proceeding to consider whether the balance of convenience laid in the plaintiff's favour. The second step was if damages would not provide an adequate remedy for the plaintiff in the event of it succeeding at the trial, the learned judge should then consider whether, if the defendants were to succeed at the trial in establishing their rights to do that which was sought to be restrained, they would be adequately compensated under the plaintiff's undertaking as to damages to the loss they would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason to refuse an interlocutory injunction. The third step was that if there was doubt as to the adequacy of the respective remedies in damages available to either party or to both, only then should the judge proceed to consider the question of balance of convenience. The last step was where other factors appeared to be evenly balanced, in which case the question of the preservation of the status quo would come into play. In the instant case, the learned High Court judge did not follow these steps at all but considered them all together, which was wrong. Since the first step had not been crossed, there was no need to consider other matters relating to the balance of convenience and the measures calculated to preserve status quo as elaborated by the judge (see p 143C–H).

(3) The learned High Court judge was swayed by the fact that the plaintiff had constructed the building at its own costs and the second defendant had certified the sum of RM102,428,245.83 to be the estimated value of the works done. Such reliance was misplaced because under the contract, the issuance of the interim statements by second defendant was solely for the purpose of the plaintiff's monthly drawdown from its financial institution for work done on the site and no payment can be demanded from the first defendant based on the interim statements of work done. The judge also relied on the favorable article regarding the building in the local newspaper. Such reliance was wrong because the newspaper article was merely for publicity in the interest of business efficacy and this did not mean that the major shortcomings bore no truth (see pp 144H–145C).

(4) The decision in granting the injunctions and the making of the orders was unjust because the first defendant was compelled to continue to employ the plaintiff notwithstanding that the latter could not deliver the building on time and in accordance with the approved specification. By the injunctions, the plaintiff was allowed to remain in possession of the site, thus aggravating the existing stalemate between the parties and by the injunctions, the first defendant was virtually forced to accept the major shortcomings even though some of them were contrary to the approved specification. Accordingly, since the learned judge had manifestly proceeded on wrong grounds in the exercise of his discretion to grant the injunctions and in making the orders, this court was entitled to interfere (see p 145C–G).

(5) The defendants were at all times ready and willing to do all things necessary to the proper conduct of the arbitration. The onus was on the plaintiff to satisfy the court that it was proper to refuse the application for stay and strong grounds for refusing a stay must be exhibited by the plaintiff. Generally however, the approach of the court would be that parties who made a contract to arbitrate their disputes, should be held to their bargain (see p 146D–F).

(6) The learned judge referred to four authorities with regard to whether entering conditional or unconditional appearance amounted to taking steps in the proceedings. However he did not make a clear cut finding as to which authority he followed. Therefore, going by the hierarchy, the court was inclined to follow *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* where the Court of Appeal held that the entry of an unconditional appearance constituted the taking of a step in the proceedings. Hence, in the instant case, since the defendants had entered a conditional appearance and merely applied for stay, the same did not amount to the taking of a step in the proceedings within the meaning of s 6 of the Arbitration Act 1952 (see p 147A–E); *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529 followed.

(7) The learned judge had proceeded on wrong grounds in refusing the stay. An arbitration process would be more expeditious because the sole issue to be resolved would be whether the CPC should be issued. On the other hand, since court proceedings, were usually protracted, the completion of the construction of the building would be prolonged. Even though the court had the jurisdiction to hear the dispute, it was apt that the dispute be settled by arbitration as the question of the issuance of the CPC was technical in nature. In this regard, an independent arbitrator with vast knowledge and experience in the construction industry would be more ideal for the purpose. Accordingly, the learned High Court judge could not have been satisfied that the plaintiff had exhibited strong grounds for refusing a stay. This warranted interference by this court (see pp 147F–I, 148F–G).

(8) It would be unjust to prevent the defendants from going to arbitration and to force them to have their rights determined by litigation. Further, there was no good reason for the plaintiff to decline to honor its bargain under the contract to settle the dispute by arbitration. Since there was no inherent objection to an action and an arbitration proceeding side by side, the issues of conspiracy and trespass can be adjudicated upon by the court and those issues that had arisen from the disputes under the contract can be adjudicated upon by an arbitrator (see pp 147G, 148D–E).

[Bahasa Malaysia summary

Di bawah satu kontrak yang dibuat di antara defendan pertama dan plaintif, plaintif telah diambil bekerja membina sebuah kompleks perdagangan dan pangsapuri di Kuala Lumpur dikenali sebagai 'Bangunan Marinara' ('bangunan tersebut'). Ia merupakan satu kontrak bayaran selesai bernilai RM110j. Bayaran dijamin oleh suatu jaminan bank yang tidak boleh dibatalkan sebanyak RM122.77j yang dikeluarkan oleh Bank Bumiputra Malaysia Bhd memihak kepada plaintif. Bayaran di bawah jaminan bank tersebut akan dibuat atas keluaran sijil penyelesaian praktikal ('SPP') oleh arkitek bangunan tersebut ('defendan kedua'). Tarikh penyelesaian yang ditetapkan oleh kontrak tersebut adalah 15 September 1997 tetapi plaintif gagal memenuhi tarikh yang ditetapkan untuk penyelesaian dan tarikh penyelesaian dilanjutkan dari masa ke semasa, yang terakhir merupakan Mac 2000. Defendan pertama mengatakan bahawa pada penutup tarikh terakhir untuk penyelesaian keingkaran terus berlaku di pihak plaintif. Selepas pengeluaran notis oleh defendan kedua dan jurutera perunding yang menyatakan kekurangan-kekurangan utama yang terdapat pada bangunan tersebut, plaintif terus memulihkan kekurangan-kekurangan tersebut. Defendan pertama dan kedua tidak berpuas hati dengan kerja pemulihan yang dijalankan oleh plaintif dan defendan kedua enggan mengeluarkan SPP. Oleh yang demikian, plaintif tidak dapat menuntut bayaran di bawah jaminan bank tersebut. Pada 14 Jun 2000, defendan ketiga kononnya di bawah kuasa defendan pertama memasuki kawasan bangunan tersebut dengan pengawal-pengawal berseragam, yang di antara mereka dilengkapi dengan senapang. Plaintif kemudiannya memfailkan satu tindakan writ terhadap defendan-defendan berdasarkan pencerobohan dan persubahatan untuk mengancam hak dan kepentingan sah plaintif di bawah kontrak tersebut. Plaintif seterusnya memfailkan satu permohonan di dalam lampiran (8) di Mahkamah Tinggi bagi injunksi-injunksi untuk: (a) menahan defendan ketiga, pekerja dan ejennya daripada memasuki kawasan projek tanpa kebenaran bertulis plaintif; (b) menahan defendan pertama dan kedua daripada meneruskan persubahatan untuk mengancam hak dan kepentingan plaintif dalam projek tersebut dan untuk menahan plaintif daripada

menyelesaikan projek tersebut, termasuk pengeluaran mana-mana notis penamatan menurut persubahatan tersebut. Sementara itu, defendan-defendan memfailkan satu permohonan dalam lampiran (16) untuk menggantung tindakan writ plaintif sementara menunggu penyelesaian timbangtara menurut kontrak tersebut. Mahkamah Tinggi membenarkan permohonan plaintif dalam lampiran (8) dan menolak permohonan defendan-defendan dalam lampiran (16). Berkaitan dengan lampiran (8), hakim Mahkamah Tinggi yang arif mendapati bahawa fakta-fakta yang dikemukakan mendedahkan satu isu bona fide serius yang harus dibicarakan dan bahawa plaintif akan mengalami kerugian tidak boleh dipulihkan yang tidak dapat diberi pampasan secukupnya dengan gantirugi sekiranya injunksi tidak diberikan. Mengenai lampiran (16) pula, hakim yang arif telah berpuas hati bahawa plaintif telah memberi alasan-alasan yang mencukupi tentang mengapa perbezaan di antara pihak-pihak tidak harus dirujuk kepada timbangtara. Dengan itu beliau menolak penggantungan atas alasan, antara lainnya, bahawa timbangtara tidak akan menyelesaikan masalah antara pihak-pihak tetapi akan menjadi satu latihan yang dilanjutkan dan bahawa defendan-defendan telah memfailkan kemasukan bersyarat yang mana bermakna mengambil langkah dalam prosiding. Hakim yang arif seterusnya memutuskan bahawa adalah baik sekiranya isu-isu persubahatan, pencerobohan, keluaran SPP dan penamatan kontrak dibicara bersama di mahkamah. Ini merupakan rayuan defendan-defendan.

Diputuskan, membenarkan rayuan defendan-defendan:

(1) Terdapat satu isu bona fide serius yang harus dibicarakan di dalam kes ini. Walau bagaimanapun, hakim yang arif telah salah pakai undang-undang kepada fakta kes ini apabila beliau memutuskan bahawa plaintif akan mengalami kecederaan yang tidak boleh dipulihkan secukupnya dengan pampasan sekiranya injunksi tidak diberikan. Gantirugi yang bakal ditanggung oleh plaintif bersifat kewangan dan boleh dikira. Jika sekiranya defendan-defendan tidak berada dalam kedudukan kewangan yang baik untuk membayar gantirugi tersebut, cara untuk memberi pampasan plaintif telah sedia ada dalam bentuk jaminan bank tersebut. Jaminan bank tersebut tidak boleh ditarik balik dan tuntutan atasnya boleh dibuat setelah plaintif mengemukakan SPP kepada bank tersebut dalam tempoh 14 hari selepas tarikh pengeluarannya. Maka, sekiranya plaintif berjaya di dalam perbicaraan, ia akan mendapat pampasan secukupnya dengan satu award gantirugi untuk kerugian yang ditanggungnya akibat perkara-perkara yang terus dibuat oleh defendan-defendan di antara masa permohonan dan masa perbicaraan yang mana plaintif ingin menghalang. Justeru itu, permohonan plaintif untuk injunksi harus ditolak, tidak kira betapa kukuh tuntutan plaintif pada peringkat itu (lihat ms 142F–143B); *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 diikut.

(2) Hakim Mahkamah Tinggi yang arif mesti terlebih dahulu berpuas hati bahawa plaintif akan mengalami satu kerugian yang tidak boleh dipulihkan atau bahawa plaintif tidak dapat diberi pampasan yang secukupnya dengan gantirugi sebelum terus menimbang sama ada imbangan kemudahan terletak di pihak plaintif. Langkah kedua adalah sekiranya gantirugi tidak memperuntukkan remedi yang mencukupi untuk plaintif andainya ia berjaya di perbicaraan, hakim yang arif kemudiannya harus menimbangkan sama ada, jika defendan-defendan berjaya di perbicaraan dalam membuktikan hak mereka untuk membuat apa yang hendak ditahan, mereka akan dipampas dengan secukupnya di bawah akujanji plaintif mengenai gantirugi kepada kerugian mereka tanggung akibat dicegah daripada berbuat demikian di antara masa permohonan dibuat dan masa perbicaraan. Sekiranya gantirugi di bawah akujanji sedemikian akan merupakan remedi yang mencukupi dan plaintif berada dalam kedudukan kewangan untuk membayarnya, tiada alasan untuk menolak permohonan injunksi interlokutori. Langkah ketiga adalah bahawa sekiranya wujud keraguan tentang kecukupan remedi masing-masing dalam gantirugi yang sedia kepada mana-mana pihak atau kedua-duanya, maka pada ketika itulah hakim harus terus menimbangkan soalan imbangan kemudahan. Langkah terakhir adalah sama ada di mana faktor-faktor lain bila diimbang secara rata, soalan pengekalan status quo akan timbul. Dalam kes ini, hakim Mahkamah Tinggi yang arif tidak mematuhi langkah-langkah ini sama sekali tetapi menimbangkan mereka semua sekaligus, iaitu cara yang salah. Oleh kerana langkah pertama tidak dibatasi, tiada keperluan untuk menimbang perkara lain berhubung dengan imbangan kemudahan dan sukatan yang dihitung untuk mengekalkan status quo yang ditekankan oleh hakim tersebut (lihat ms 143C–H); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 diikut.

(3) Hakim Mahkamah Tinggi yang arif dipengaruhi oleh hakikat bahawa plaintif telah membina bangunan tersebut atas kosnya sendiri dan defendan kedua telah mengaku jumlah RM102,428,245.83 sebagai nilai anggaran kerja yang dijalankan. Kepercayaan demikian telah disalahletak kerana di bawah kontrak tersebut, pengeluaran pernyataan-pernyataan interim oleh defendan kedua adalah semata-mata untuk tujuan bayaran bulanan 'drawdown' plaintif daripada institusi kewangan untuk kerja yang dijalankan di kawasan tersebut dan tiada bayaran boleh dituntut daripada defendan pertama berdasarkan pernyataan-pernyataan interim untuk kerja yang dijalankan. Hakim juga bergantung kepada rencana akhbar yang membuat liputan yang baik berhubung dengan bangunan tersebut dalam akhbar tempatan. Kepercayaan demikian adalah salah kerana rencana akhbar cuma sekadar untuk publisiti dalam kepentingan

perdagangan dan ini tidak bermakna bahawa kekurangan-kekurangan utama yang tidak terdapat pada bangunan tersebut adalah tidak benar (lihat ms 144H–145C).

(4) Keputusan memberikan injunksi dan perintah-perintah tersebut adalah tidak adil kerana defendan pertama telah diwajibkan untuk terus menggajikan plaintif walaupun plaintif tidak dapat menyerahkan bangunan tersebut menepati masa dan menurut penentuan yang diluluskan. Melalui injunksi-injunksi tersebut, plaintif dibenarkan mengekalkan milikan kawasan tersebut, justeru itu memburukkan kebuntuan yang wujud di antara pihak-pihak dan melalui injunksi-injunksi tersebut, defendan pertama pada hakikatnya dipaksa menerima kekurangan-kekurangan utama yang terdapat pada bangunan tersebut walaupun di antara mereka terdapat percanggahan mengenai penentuan yang diluluskan. Oleh itu, oleh kerana hakim yang arif telah meneruskan tindakan atas alasan yang salah dalam pelaksanaan budi bicara beliau untuk memberikan injunksi-injunksi tersebut dan dalam membuat perintah, mahkamah ini berhak campur tangan (lihat ms 145C–G).

(5) Defendan-defendan pada semua masa bersedia dan rela membuat segala yang perlu untuk pelaksanaan wajar timbangtara. Beban terletak pada plaintif untuk memuaskan mahkamah bahawa adalah wajar untuk menolak permohonan untuk penggantungan dan alasan yang kukuh untuk menolak penggantungan mesti ditunjukkan oleh plaintif. Walau bagaimanapun, pada umumnya, pendekatan yang diambil oleh mahkamah adalah bahawa pihak-pihak yang membuat kontrak untuk menimbangtara pertikaian mereka harus terikat dengan janji mereka (lihat ms 146D–F).

(6) Hakim yang arif telah merujuk kepada empat otoriti berkenaan sama ada kemasukan bersyarat atau tanpa syarat bermaksud mengambil langkah dalam prosiding. Walau bagaimanapun, beliau tidak menyatakan dengan jelas otoriti mana yang beliau ikuti. Oleh itu, mengikut hierarki, mahkamah cenderung untuk mengikut keputusan di dalam *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529 di mana Mahkamah Rayuan telah memutuskan bahawa kemasukan kehadiran tanpa syarat membentuk pengambilan langkah dalam prosiding. Justeru itu, dalam kes ini, oleh kerana defendan-defendan telah memasukkan kehadiran bersyarat dan cuma memohon penggantungan, yang sama tidak berjumlah kepada pengambilan langkah dalam prosiding dalam lingkungan maksud s 6 Akta 1952 (lihat ms 147A–E); *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529 diikut.

(7) Hakim yang arif telah meneruskan tindakan atas alasan yang salah dalam menolak penggantungan. Satu proses timbangtara akan lebih pantas kerana satu-satunya isu untuk diselesaikan adalah sama ada SPP harus dikeluarkan. Sebaliknya, memandangkan

prosiding mahkamah biasanya berlanjutan, penyelesaian pembinaan bangunan tersebut akan mengambil masa. Walaupun mahkamah mempunyai bidang kuasa untuk mendengar pertikaian tersebut, adalah lebih sesuai untuk pertikaian tersebut diselesaikan melalui timbangtara oleh kerana soalan tentang keluaran SPP bersifat teknikal. Oleh kerana itu, seorang penimbangtara bebas dengan pengetahuan dan amalan luas dalam industri pembinaan lebih sesuai untuk tujuan ini. Justeru itu, hakim Mahkamah Tinggi yang arif tidak mungkin berpuas hati bahawa plaintif telah menunjukkan alasan yang kukuh untuk menolak penggantungan. Ini mewajarkan campur tangan daripada mahkamah ini (lihat ms 147F–I, 148F–G).

(8) Adalah tidak adil untuk menghalang defendan-defendan daripada merujuk kepada timbangtara dan untuk memaksa mereka menentukan hak mereka melalui litigasi. Seterusnya, tiada alasan yang baik untuk plaintif enggan menepati janjinya di bawah kontrak untuk menyelesaikan pertikaian melalui timbangtara. Oleh kerana tiada bantahan sedia ada terdapat untuk tindakan dan prosiding timbangtara dijalankan bersampingan, isu-isu mengenai persubahatan dan pencerobohan boleh diadili oleh mahkamah dan isu-isu yang telah timbul dari pertikaian di bawah kontrak boleh diadili oleh seorang penimbangtara (lihat ms 147G, 148D–E).]

Notes

For cases on interlocutory injunction, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2707–2794.

For cases on arbitration, stay of proceedings, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5514–5522.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 (folld)

Evans v Bartlam [1937] AC 473 (refd)

Hashim bin Majid v Param Cumaraswamy & Ors [1993] 2 MLJ 20 (refd)

Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd [1999] 2 MLJ 529 (folld)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (folld)

Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 (refd)

Lloyd v Wright [1983] 2 All ER 969 (refd)

New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading) [1992] 1 MLJ 185 (refd)

Northern Regional Health Authority v Derek Crouch Construction Co Ltd [1984] 2 All ER 175 (refd)

PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd [1999] 6 MLJ 1 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)
Sime Axa Assurance Bhd and another appeal v Interscope Versicherung Sdn Bhd
Tubeworkers Ltd v Tilbury Construction Ltd 30 BLR 67 (2 April 1985) (refd)
Usahabina v Anuar bin Yahya [1998] 7 MLJ 691 (refd)

Legislation referred to

Arbitration Act 1952 s 6
Rules of the High Court 1980 O 18 r 19(1)

Appeal from: Suit No S5–22–408 of 2000 (High Court, Kuala Lumpur)

YM Raja Aziz Addruse (*Philip Choong* with him) (*Philip Choong & Co*) for the appellant.
Roy Sreenivasan (*Cheang & Arif*) for the respondent.

Mohd Noor Ahmad JCA (delivering judgment of the court): The case is related to the construction of commercial and apartment complex on Lot Nos 151, 152 and 157, section 87A, Jalan Tun Razak Kuala Lumpur known as the 'Marinara' building ('the building'). The proceedings in the High Court are concerned with two enclosures. Enclosure (8) is in respect of injunctions and encl (16) is in connection with a stay pending reference to arbitration. On encl (16), the learned judge dismissed with cost the defendants' application for stay of the writ action filed by the plaintiff and all the other proceedings therein pending reference to arbitration. With regard to encl (8) the learned judge granted the injunctions sought for by the plaintiff with costs and made certain orders relating thereto.

Briefly, by the injunctions and the orders the third defendant, its employees or agents were restrained from entering the project site without any written consent of the plaintiff and that the third defendant, its employees or agents were required to vacate the project site (prayer (a)), and that the first and second defendants were restrained from proceeding with their conspiracy to injure the plaintiff's rights and interests in the project and to prevent the plaintiff from completing the project, including the issuance of any notice of termination in pursuance of the conspiracy (prayer (b)). Further, a professional consultant's company by the name of Messrs Symonds Travers Morgan (M) Sdn Bhd ('STM') was appointed by the court to proceed to the project site and inspect and examine the works that have been completed by the plaintiff and report its findings to the court in regard to the completion of the works. In the event, STM was of the view that the construction of the building had reached practical completion, the second defendant was ordered to issue the certificate of practical completion ('the CPC') immediately and failing which a certificate signed by the senior assistant registrar shall for all purposes be accepted as the

CPC. Further, the plaintiff was ordered to carry out the works relating to the major shortcomings as listed in the relevant documents and to complete the works on or before 30 June 2001 and thereafter to report such completion to the court on 30 June 2001 at 11am by submitting a report, to be signed by a qualified architect recognized by the Pertubuhan Akitek Malaysia.

The defendants appealed. We allowed the appeal with costs here and below, and set aside the injunctions and the orders, and granted a stay of the writ action and the relevant proceedings therein pending arbitration. We reserved the issue of cost payable to STM for the work done pursuant to the order of the learned judge, if any and if not amicably resolved. We now give our reasons.

To summarize the facts of the case, under a contract made between the first defendant and the plaintiff on 16 March 1995, the plaintiff was employed to construct the building. It was a lump sum contract in the value of RM110m. The payment was guaranteed by an irrevocable bank guarantee issued by Bank Bumiputra Malaysia Bhd in favor of the plaintiff. The bank guarantee has the value of RM122.77m inclusive of the financing cost in the sum of RM12.77m. The payment would be made upon the issuance of the CPC by the second defendant, the architect of the building. The plaintiff was given possession of the site on 16 March 1995 and the date for completion stipulated by the contract was 15 September 1997. The plaintiff failed to meet the target date for completion and subsequently the date for completion was extended from time to time, the last of which was March 2000. In between the extended periods, the second defendant issued several notices in writing to the plaintiff under cl 25 of the conditions of contract requiring the plaintiff to proceed regularly and diligently with the works, failing which the first defendant might exercise its right to determine the plaintiff's employment under the contract. On 22 March 2000, the second defendant certified a sum of RM102,428,245.83 to be the estimated value of the works done. However, the second defendant refused to certify the progress claim number 58 in the sum of RM111,381,898.70 submitted by the plaintiff on 10 May 2000. The first defendant alleged that at the end of the last date for completion there was continuing default on the part of the plaintiff. As such an internal meeting was held by the first defendant on 16 May 2000 to consider on terminating the contract and to explore how and when it could be done. On 22 May 2000, the plaintiff wrote to the second defendant requesting for the CPC to be issued as the status of all the major items had been completed. On 29 May 2000, one Bob Giles, a former project architect of the second defendant who was no longer an authorized architect under the laws of Malaysia inspected the works and put up a report to the first defendant with a copy extended to the plaintiff listing out nine items as examples of the worst failures on the part of the plaintiff to meet the specification. On the same day, one Dato' Baharuddin for and on behalf of the second defendant wrote a letter to the first defendant in terms which were substantially identical to that of Bob Giles' with a copy extended to the plaintiff. On 30 May 2000, the consulting engineer put up a report to the second defendant listing out the defects in respect of the mechanical and

A electrical works in the building with a copy extended to the first defendant. On 1 June 2000, the second defendant issued another written notice to the plaintiff pursuant to cl 25 of the conditions of contract listing out seven items of major shortcomings based on Bob Giles' and the consulting engineers's reports. After the issuance of the said notice, the plaintiff proceeded regularly and diligently to remedy the shortcomings which were B capable of being remedied. The first and second defendants were not satisfied with the remedial works done by the plaintiff. In the meantime, the plaintiff kept on pressing the second defendant to issue the CPC. On 14 June 2000, the third defendant under the purported authority of the first defendant entered the site with uniform guards, some of whom were C armed with shotguns. However, the third defendant vacated the site upon being served with an ex parte injunction order issued by the High Court on 19 June 2000. At the date of hearing of the enclosures in the High Court, the contract had not been terminated.

The plaintiff took the stand that, notwithstanding the major shortcomings, the works in respect of the building had been practically D completed. However, the second defendant refused to issue the CPC. As such, the plaintiff was not able to claim payment under the bank guarantee. Therefore, the writ action based on trespass and conspiracy to injure the legitimate rights and interests of the plaintiff under the contract was filed and the injunctions sought. On the other hand, the defendants E asserted that due to the major shortcomings the plaintiff was not entitled to be issued with the CPC. As the conditions of contract provided for arbitration on any dispute arising under the contract, the defendants applied for stay of the writ action and other proceedings therein. Clearly, the issues involved in the writ action are trespass, conspiracy and the issuance of the CPC.

F We are fully aware that the decisions of the learned judge on the two enclosures were made in the exercise of his discretion. It is settled law that an appeal will not be entertained from an order which it was within the discretion of the judge to make unless it be shown that he exercised his discretion under a mistake of law (see *Evans v Bartlam* [1937] AC 473) or G where discretion is given to a judge the appellate court ought not to review his decision unless he has declined to exercise his discretion or has manifestly proceeded on a wrong ground (see *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185 at p 200E).

H *Re encl (8)*

The learned judge was right on the statement of the law relating to the basic principles on the granting of an interlocutory injunction including a mandatory injunction. He referred to the classic case of *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 and correctly stated the basic I principles in these terms:

(1) that there is a serious question to be tried;

(2) that in the event that the applicant were to succeed at the trial damages would not be an adequate compensation for his loss; A

(3) that the balance of convenience lies in the applicant's favor; and

(4) that there are special circumstances in favour of the applicant or in favour of the respondent.

B

In his deliberation, he also took into consideration the law as phrased by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 at pp 195–196 which is as follows:

> [A] judge hearing an application for an interlocutory injunction should:
>
> (1) ask himself whether the totality of the facts presented before him disclosed a bona fide serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defence to it and identify with precision the issues raised and decide whether they are serious enough to merit a trial. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious questions to be tried, he should move on to the next step of his inquiry; C D
>
> (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal; and E
>
> (3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the status quo. It is a judicial discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion. F

We agree with the learned judge that the totality of the facts presented had disclosed a bona fide serious issue to be tried. However, it appears the learned judge agreed with the submission of Mr Chua Eng Siong, the counsel for the plaintiff that the plaintiff would suffer an irreparable injury that could not be adequately compensated by damages if the injunction was not granted. To this we do not agree. We are of the view that the learned judge had misapplied the law to the facts of this case. In this case, without any doubt whatsoever that the damages the plaintiff will suffer are monetary. Even if the defendants will not be in a financial position to pay the damages the means to compensate the plaintiff will always be there in the form of the bank guarantee. The bank guarantee is irrevocable and claim on it can be made upon production by the plaintiff to the bank of the CPC within the 14 days following the date of its issue. Being an irrevocable guarantee there is no way the bank can escape from liability to pay under it until the CPC has been issued and a claim made on it within 14 days after its issuance. This is so even if the contract is terminated by the first defendant unless it is subsequently adjudicated that the termination is lawful. In fact, on record without taking into account the amount of the retention sum held by the bank the amount under the bank guarantee then G H I

was in excess of the value of works done and the claim submitted by the plaintiff to the second defendant for certification. It will not be difficult to assess the amount of work completed as the estimated value of the works done had been certified by the second defendant and that the plaintiff had submitted to the second defendant the progress claim number 58 in respect of subsequent works for verification. Therefore, we are satisfied that if the plaintiff succeeds at the trial it will be adequately compensated by an award of damages for the loss it will suffer as a result of the defendants' continuing to do what is sought to be restrained between the time of the application and the time of the trial. Hence, the application for the injunctions should have been refused, no matter how strong the plaintiff's claim appeared to be at that stage (see *American Cyanamid Co v Ethicon Ltd*). The relevant matters under the balance of convenience must be considered step by step. First, the learned judge must be satisfied that the plaintiff would suffer an irreparable injury or that the plaintiff could not be adequately compensated in damages before proceeding to consider other relevant matters on the balance of convenience. This step is in consonance with what was said by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* in para (2) cited above, couched in the phrase 'He must take into account all relevant matters, including practical realities of the case before him ... .' It must be so since *American Cyanamid v Ethicon Ltd* is the locus classicus on the subject, and the learned judge in that case was not making new law but adopting the basic principles. The second step is if damages would not provide an adequate remedy for the plaintiff in the event of it succeeding at the trial, the learned judge should then consider whether that if the defendants were to succeed at the trial in establishing their rights to do that which was sought to be restrained, they would be adequately compensated under the plaintiff's undertaking as to damages to the loss they would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction. The third step is if there was doubt as to the adequacy of the respective remedies in damages available to either party or to both then only the judge should proceed to consider the question of balance of convenience. And the last step is where other factors appeared to be evenly balanced the question of the preservation of the status quo would then come into play. The learned judge did not follow these steps at all but considered them all together. Therefore, in our view, with due respect, he was wrong. As that first step had not been crossed, we need not touch on the other matters relating to the balance of convenience and the measures calculated to preserve the status quo as elaborated by the learned judge. To make it clearer perhaps it is apt to quote what was said by Lord Diplock in *American Cyanamid Co v Ethicon Ltd & Ors*, viz:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for

detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (*Wakefield v Duke of Buccleuch* (1865) 12 LT 628 at p 629). So unless the material available to the court at the hearing of the application for an interlocutory fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at the stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo ... .

To paint a scene from the situation created by the dispute between the parties, on one hand there is the plaintiff which wants to be paid immediately for the works done at its own cost as it is of the view that the issuance of the CPC is justified and on the other hand, the defendants are resisting the issuance of the CPC by reason of the major shortcomings, thus preventing the plaintiff from making the claim on the bank guarantee. In our view, the learned judge in arriving at the decision he had made was really swayed by three factors, namely: (i) the plaintiff had constructed the building at its own costs; (ii) the second defendant had certified the sum of RM102,428,245.83 to be the estimated value of the works done. This is evident from the frequency of mention of that certified sum in his judgment, at least ten times and the tone of his statement on that certificate which

suggests much reliance on it. To our mind, such reliance is misplaced because under cl 6.0 of the contract the issuance of the interim statements by second defendant in response to the progress claim previously submitted by the plaintiff which culminated in the issuance of the said certificate is solely for the purpose of the plaintiff's monthly draw down from its financial institution for work done on site and that no payment can be demanded from the first defendant based on the interim statements of work done. Though the learned judge mentioned cl 6.0 in his judgment unfortunately he did not highlight this point; and (iii) the glowing write up of the building in the local newspaper *SunBiz* of Saturday, 3 June 2000 by Laura Lee. In our view, such reliance is also wrong because the write up was merely a publicity in the interest of business efficacy but far from suggesting that the major shortcomings bore no truth.

Another unsatisfactory feature of the decision of the learned judge in granting the injunctions and the making of the orders is the effects of the injunctions and the orders made. Firstly, by the injunctions the first defendant was compelled to continue to employ the plaintiff which could not deliver the building on time and in accordance with the approved drawings and specification as evident from the major shortcomings, and which had its own remedy in damages if subsequently the contemplated determination proved to be wrongful. Secondly, by the injunctions the plaintiff was allowed to remain in possession of the site and this might aggravate the existing stalemate which would be of no benefit but losses to both sides and such situation would not be conducive to the economy of the country. Thirdly, by the injunctions the first defendant was virtually forced to swallow the patent defects as reflected in the major shortcomings even though some of them were contrary to the approved drawings and specification and some involving leakage and causing damage to the timber flooring. Therefore, the decision is unjust. And lastly, by the orders the first defendant, was compelled to accept STM, the same consultant which was earlier employed by the plaintiff to do the Contract Completion Status Review Report — July 2000, and therefore, the independence of the party appointed by the court was sacrificed.

Therefore, as the learned judge had manifestly proceeded on wrong grounds in the exercise of his discretion to grant the injunctions and in making the orders, we are entitled to interfere.

Re encl (16)

Clause 34(1) of the conditions of contract provides the machinery for arbitration in respect of any dispute or difference that arises between the employer or architect on his behalf and the contractor at any time as to any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by the contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled. On this occasion, the withholding of the issuance of the CPC by the architect is in issue. It is manifestly clear that the sole purpose of the plaintiff's action is to prevent the first defendant

from determining the plaintiff's employment under the contract and to compel the second defendant to issue the CPC to enable the plaintiff to make claim on the bank guarantee when the plaintiff has not completed the works under the contract to the satisfaction of the second defendant. With that in mind and that of our decision on encl (8) we proceed to consider whether or not the learned judge was right in the exercise of his discretion to refuse a stay of the writ action and all the relevant proceedings therein. The defendants based their application for stay under s 6 of Arbitration Act 1952 ('the Act') which reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

We note that the defendants at the time when the proceedings were commenced and still remain ready and willing to do all things necessary to the proper conduct of the arbitration. We are in agreement with the learned judge on his statement of the law relating to stay. It is trite law that the onus is on the plaintiff to satisfy the court that it is proper to refuse the application for stay and strong grounds for refusing a stay must be exhibited by the plaintiff. If the defendants can satisfy the court that the conditions for the grant of a stay under the section are satisfied, it does not ipso facto follow that they are entitled, as of right, to a stay, for the court still retains a discretion to refuse it. But, generally, the approach of the court will be that parties who make a contract to arbitrate their disputes, should be held to their bargain (see *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 and the authorities cited therein). In *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459, it was held that in exercising its discretion, it is the prima facie duty of the court to act upon such an arbitration agreement.

The learned judge was satisfied that the plaintiff had given sufficient reasons as to why the differences between the parties should not be referred to arbitration and he refused stay based on the grounds which are summarized as follows:

(1) The construction of the building is saddled by squabbles between the parties. An arbitration would not solve their problems and it would certainly be a prolonged exercise.

(2) It would be best that all the issues before the court, that is to say, the issues of conspiracy, trespass, the issuance of the CPC and the termination of contract be heard together by the court since it has the jurisdiction to hear the dispute.

(3) Presumably, by entering the conditional appearance coupled with the filing of the application for stay the defendants had been regarded as having taken other steps in the proceedings and therefore, was detrimental to them. We so presume because the learned judge merely referred to four authorities which, one way says that the entry of unconditional appearance amounted to taking steps in the proceedings within the meaning of s 6 of the Act and the other way says that the entry of unconditional appearance does not or the filing of a conditional appearance coupled with an application for stay as well as a prayer to strike out the plaintiff's suit under O 18 r 19(1) of the Rules of the High Court 1980 amounted to taking steps in the proceedings. The learned judge did not make a clear-cut finding as to which authority he followed. The four authorities are *Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691, *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529, *PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd* [1999] 6 MLJ 1 and *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20. As we do not have the benefit of a written judgment of the Federal Court in *Sime Axa Assurance Bhd and another appeal v Interscope Versicherung Sdn Bhd*, we are in a predicament as to which authority to follow. The learned judge was also in the same situation. Therefore, going by the hierarchy we are inclined to follow the decision in *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* where the Court of Appeal held that the entry of an unconditional appearance constituted the taking of a step in the proceedings. Hence, in the case before us since the defendants had entered a conditional appearance and merely applied for stay, we are of the view that it did not amount to the taking of a step in the proceedings within the meaning of the section of the Act.

With regard to ground (1), we do not agree with the learned judge. Arbitration process will be more expeditious and since the sole issue that will be before the arbitrator in the context of the dispute is whether the CPC should be issued based on the completion status their problem can be solved faster. On the contrary, as the court proceedings including interlocutory applications and the process of appeals are usually protracted the completion of the construction of the building will be prolonged. The fact that the learned judge had given an early date for trial does not make much difference. We cannot see any good reason as to why the plaintiff declined to honor its bargain under the conditions of contract to settle the dispute by arbitration when the two reports on the assessment of the completion status prepared by STM are in its favour.

In respect of ground (2), the learned judge was wrong. No doubt that all the issues are before the court and the court has the jurisdiction to hear the dispute. However, we are of the view that as the question of the issuance of the CPC is technical in nature it is apt that the dispute be settled by arbitration and an independent arbitrator with vast knowledge and experience in the construction industry especially in the building construction will be more ideal for the purpose. Whereas in the court

proceedings usually the judge will have to depend on the opinion of an expert in that field and if he accepts the expert evidence he will have to make his own findings based on the evidence. This process does not involve a direct transmission of the knowledge and experience for arriving at the decision as compared to arbitration where the decision of the arbitrator is without any doubt whatsoever based on the direct transmission of his knowledge and experience in that area. Further, the court has no power to open up and review the exercise of the architect's discretion since the court's jurisdiction is limited to determining and enforcing the contractual rights of the parties and does not extend to substituting its own discretion merely because it would have reached a different conclusion since to do so would interfere with the agreement of the parties. Whereas the arbitrator, in the exercise of his power given by the contract, is entitled to modify the parties' contractual rights by substituting his own discretion for that of the architect if the arbitrator disagrees with the architect's certificates, opinions and decisions (see *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175 (CA), *Tubeworkers Ltd v Tilbury Construction Ltd* 30 BLR 67 (2 April 1985)). In this case, such power is given under cl 34(2) of the Conditions of Contract. Therefore, it follows that it would be unjust if the defendants were to be prevented from going to arbitration and were forced to have their rights determined by litigation to which they had never agreed under a jurisdiction which would probably be more limited than that of the arbitrator. And further, there is no inherent objection to an action and an arbitration proceeding side by side (see *Lloyd v Wright* [1983] 2 All ER 969). That being the case, the issues of conspiracy and trespass and those issues that had arisen from the disputes or differences under the contract can be adjudicated upon by different tribunals, that is to say, the former by the court and the latter by an arbitrator. After all the disputes between the parties leading to court action were triggered by the withholding of the issuance of the CPC by the second defendant. To our mind, once the question on the issuance of the CPC is decided by the arbitrator, one way or the other, the urgency in the court action will be reduced.

Therefore, as the learned judge had manifestly proceeded on wrong grounds in refusing the stay he could not have been and ought not to have been satisfied that the plaintiff had exhibited strong grounds for refusing a stay. Hence, we have to interfere.

Defendants' appeal allowed.

Reported by Lim Lee Na